STATE OF MICHIGAN

COURT OF APPEALS

ATTORNEY GENERAL and DEPARTMENT OF ENVIRONMENTAL QUALITY, Plaintiffs-Appellants, v ALTERNATIVE FUELS, L.C., Defendant-Appellee.	UNPUBLISHED February 7, 2006 No. 264075 Ingham Circuit Court LC No. 03-001111-CE

Before: Bandstra, P.J., and Fitzgerald and White, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court order dismissing their claims against defendant Alternative Fuels, L.C., operator of a scrap tire collection and processing site, under the primary jurisdiction doctrine.[1] We affirm.

In 2001, the Michigan Department of Environmental Quality (MDEQ) denied defendant's scrap tire collection site registration application on the basis that defendant was not sufficiently bonded. Defendant challenged this determination before the MDEQ's administrative hearings office under the Administrative Procedures Act (APA), MCL 24.201 *et seq*. Defendant has since continued to file annual registration applications, all of which have been returned to defendant as "administratively incomplete" and have become part of the contested case.[2] Defendant continued to operate the scrap tire collection site during the pendency of the contested case.

In 2003, plaintiffs brought this action seeking to compel defendant to comply with the bonding, storage, registration, and processing requirements set out in MCL 324.16901 *et seq*., the provision of the Natural Resources and Environmental Protection Act (NREPA), MCL

[1] Defendant moved to dismiss this appeal asserting that this Court lacked jurisdiction because the dismissal without prejudice was not a final order pursuant to MCR 7.202(6)(a)(i). This Court denied defendant's motion. *Attorney General v Alternative Fuels, LC*, unpublished order of the Court of Appeals, entered 9/22/05 (Docket No. 264075).

[2] The MDEQ subsequently approved defendant's 2001 registration application.

324.101 *et seq*., concerning scrap tires. These compliance issues were also raised in the contested case as part of the MDEQ's rationale for denying defendant the license it seeks to continue operating. Plaintiffs also asserted that defendant was operating an unlicensed solid waste facility under MCL 324.11501 *et seq*., entitling plaintiffs to injunctive relief, civil fines, and enforcement costs. Plaintiffs further asserted that they were entitled to response activity costs, injunctive relief, and civil fines under MCL 324.20101 *et seq*. Plaintiffs also contended that they were entitled to relief under a common law public nuisance theory because defendant created a fire and mosquito control hazard by violating the requirements set out in MCL 324.16901 *et seq*.

The trial court dismissed this case without prejudice based on the primary jurisdiction doctrine. Specifically, the trial court reasoned that the Legislature intended that the MDEQ should apply its expertise in determining a registrant's qualifications for registration/registration renewal and, accordingly, whether the registrant's site was in compliance with the statutory requirements set out in MCL 324.16901 *et seq*. Further, the trial court determined that it should not interfere in the registration process where the Legislature specifically granted the MDEQ the responsibility for overseeing that process, and should defer such matters until the proceedings are completed and reviewable in circuit court; that it should defer to the MDEQ administrative proceedings because defendant is an apparent debtor in possession continuing to operate its facility under an order entered by an administrative law judge (ALJ) and, presumably, a bankruptcy judge; that dismissing the proceedings without prejudice would not inconvenience the parties and would promote judicial and regulatory economy; and that the MDEQ had not yet initiated an administrative proceeding under MCL 24.292(2) of the APA, leading the trial court to conclude that the MDEQ did not assert "that the public health, safety or welfare requires emergency action" despite its current request for injunctive relief.

Plaintiffs argue that the trial court erred in dismissing their case on the basis of the primary jurisdiction doctrine. We disagree. We review de novo the applicability of the primary jurisdiction doctrine as a question of law. *Spect Imaging, Inc v Allstate Ins Co*, 246 Mich App 568, 580; 633 NW2d 461 (2001). An issue of primary jurisdiction arises where, although a claim may be cognizable in a court, initial resolution of issues within the special competence of an administrative agency is required. *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 197; 631 NW2d 733 (2001). Under the doctrine, the judicial process is stayed pending referral of such issues to the appropriate administrative agency for resolution. *Id*. at 207. Whether judicial review will be postponed in favor of the primary jurisdiction of an administrative agency depends on the agency rule at issue and the nature of the declaration being sought. *Id*. at 198. Referral of such issues to an administrative agency does not deprive the court of jurisdiction; rather, it has discretion to retain jurisdiction or to dismiss the case without prejudice if the parties would not be unfairly disadvantaged. *Id*.

There is no fixed formula for determining whether the doctrine of primary jurisdiction applies; each case must be decided on its own facts. *Spect*, *supra* at 580. However, in determining whether the doctrine is applicable, we first consider the extent to which the agency's specialized expertise makes it a preferable forum for resolving the issue. *Id*. We then consider the need for uniformity and consistency in resolution of the issue. *Id*. Finally, we consider whether judicial resolution of the issue will have an adverse effect on the agency's performance of its regulatory responsibilities. *Id*.

"[A]dministrative agencies possess specialized and expert knowledge to address issues of a regulatory nature," and "[u]se of an agency's expertise is necessary in regulatory matters in which judges and juries have little familiarity." *Travelers*, *supra* at 198-199. Here, all of the allegations in plaintiffs' complaint stem from defendant's alleged failure to comply with various provisions of MCL 324.16901 *et seq*. regarding scrap tires. Accordingly, this case would benefit from a prior determination by the MDEQ, with its specialized expertise in this area, in addressing the various allegations raised here by plaintiffs. Indeed, our Supreme Court has noted that "the MDEQ, in administering the NREPA within the executive branch, must undertake decisions grounded in its own expertise." *Henry v Dow Chemical Co*, 473 Mich 63, 95 n 25; 701 NW2d 684 (2005). Moreover, because plaintiffs' public nuisance tort claim is based on a dispute over the extent of defendant's responsibilities, which are anticipated by and contained in the scrap tire regulatory scheme, it is a matter incident to the regulation of defendant that falls within the primary jurisdiction of the MDEQ. *Michigan Basic Prop Ins Assoc v Detroit Edison Co*, 240 Mich App 524, 533-534; 618 NW2d 32 (2000). Accordingly, the first consideration, the need for agency expertise, weighs in favor of deferral of such matters to the MDEQ. See *Rinaldo's Constr Corp v Michigan Bell Tel Co*, 454 Mich 65, 75-76; 559 NW2d 647 (1997).

The second consideration, the need for uniformity in deciding matters incident to the regulatory scheme, also weighs in favor of deferral to the MDEQ. See *id*. at 76. The MDEQ, under MCL 324.16901 *et seq*., was granted broad authority to regulate the entire subject matter of scrap tire facilities. Under MCL 324.16904, the MDEQ is responsible for making an annual determination regarding whether a scrap tire collection site meets the statutory bonding requirements and its consequent registration eligibility. Under MCL 324.16903, the MDEQ is responsible for determining a scrap tire collection site's compliance with numerous specific and detailed statutory requirements. Here, deferral to the MDEQ would promote uniformity and consistency in the application of the scrap tire regulatory scheme, and would eliminate the potential of exposing scrap tire facilities to unanticipated liabilities that the MDEQ may not otherwise recognize. See *Travelers*, *supra* at 208; *Rinaldo's*, *supra* at 76.

Finally, the third consideration, whether judicial resolution of the issue will adversely effect the MDEQ's performance of its regulatory responsibilities, also weighs in favor of deferral to the agency. *Spect*, *supra* at 580. Because of the number and varying nature of scrap tire facilities across the state, the resolution of disputes in circuit court could hinder the MDEQ's responsibilities for administering the scrap tire act as set out by the Legislature. See *Cherry Growers, Inc v Agricultural Marketing & Bargaining Bd*, 240 Mich App 153, 164; 610 NW2d 613 (2000).

Moreover, we find no merit to plaintiffs' assertion that the invocation of primary jurisdiction is inappropriate because this litigation, which would normally be subject to the jurisdiction of the MDEQ, has "advanced to a point where it would be unfair to remit the [party] to another and duplicative proceeding . . . ." *Travelers*, *supra* at 206 n 19, quoting *White Lake Improvement Ass'n v City of Whitehall*, 22 Mich App 262, 284; 177 NW2d 473 (1970). Indeed, where the contested case was initiated in 2001 and plaintiffs did not bring this action until 2003, it is this litigation that would be duplicative if allowed to proceed.

The considerations in favor of applying the doctrine of primary jurisdiction favor deference to the MDEQ in this case, and the trial court did not err in concluding that the MDEQ was the proper forum for plaintiffs' claims. Further, an immediate determination regarding the

appropriateness of the relief sought in this action is unnecessary where the MDEQ may summarily suspend defendant's operating license if needed for the protection of the public health, safety, or welfare during the pendency of the proceedings. MCL 24.292(2).

In light of our conclusion that the trial court properly deferred to the primary jurisdiction of the MDEQ, we need not address plaintiffs' remaining arguments concerning the trial court's denial of their motion for summary disposition.

We affirm.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Helene N. White